No. 571

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APPELLANT'S BRIEF AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,653

No. 13,655

CARLOS MARCELLO,

Appellant,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES,

Appellee

Appeal from Orders of the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

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Questions Presented

No. 13,653

1. Whether an alien who had been convicted prior to 1952 but who was not deportable upon the basis of such conviction is now subject to deportation under 8 U.S.C. 1251(a)(11), or whether his non-deportable status is preserved under the savings clause of the Immigration and Nationality Act of 1952 (8 U.S.C. 1101 Note).

No. 13,655

2. Whether a stipulation signed by the Solicitor General agreeing without qualification to give the appellant three days' notice of deportation is binding upon the Government more than six months after the termination of the litigation which resulted in such stipulation.

3. Whether appellee may prescribe conditions of parole supervision under 8 U.S.C. 1252(d) other than those necessary to assure that an alien will be available for deportation.

4. Whether appellee may prevent appellant from changing his residence without appellee's consent, confine him to the City of New Orleans, impose restrictions upon his travel throughout the United States, require him to be law-abiding and not to frequent places where criminals congregate and otherwise exercise police powers over him.

5. Whether appellee may arbitrarily confine appellant to the City of New Orleans without any facts justifying such restriction where it appears that appellant is law-abiding and was previously permitted to travel throughout the United States from 1953 to 1956 without limitation and without prior approval of the Immigration Service.

6. Whether the terms of appellee's order of parole supervision are void for vagueness.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,653

No. 13,655

CARLOS MARCELLO,

Appellant,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES,

Appellee

Appeal from Orders of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

Jurisdictional Statement

These are appeals from orders granting summary judgment to the appellee entered on December 7, 1956, in No. 13,653 and on January 2, 1957, in No. 13,655 (J.A. 36 and 58). The jurisdiction of the District Court was invoked

under the Declaratory Judgment Act (28 U.S.C. 2201) and the Administrative Procedure Act (5 U.S.C. 1009). The Court has jurisdiction of this appeal pursuant to 28 U.S.C. 1292(1).

Statement of Facts

No. 13,653

The facts relating to this appeal have been previously set forth in No. 13,595, which has been consolidated with the present appeals, and they will not be restated here. This appeal is from the grant of summary judgment to appellee on December 7, 1956. (J. A. 35).

No. 13,655

Deportation proceedings were instituted against the appellant on December 30, 1952. After hearings before the Immigration and Naturalization Service and an appeal to the Board of Immigration Appeals, a final order of deportation under the administrative processes was entered on June 1, 1953.

On June 2, 1953, the appellant was taken into custody for deportation. Judicial review by way of a petition for a writ of habeas corpus was then had of the order of deportation, *Marcello* v. *Ahrens*, 113 F. Supp. 22 (E.D. La. 1953), affirmed 212 F. 2d 830 (C.C.A. 5, 1954), affirmed *U.S. ex rel. sub. nom. Marcello* v. *Bonds*, 349 U.S. 302 (1955), *rehearing denied*, 350 U.S. 846. The final order of the Court was entered on August 8, 1955, by the United States District Court for the Eastern District of Louisiana upon the mandate of the United States Supreme Court. On August 17, 1955, upon demand by the Immigration and Naturalization Service the appellant surrendered for deportation. On August 26, 1955, appellant filed a petition for a writ of habeas

corpus in the United States District Court for the Eastern District of Louisiana, alleging, *inter alia*, that the Government of Italy had revoked travel documents permitting the appellant's deportation to Italy, and that the Government of France refused to issue travel documents to that country, that the Attorney General was unable to effectuate the appellant's immediate deportation, and that his detention was arbitrary and unlawful. The writ was dismissed by the District Court, and an appeal noted. Both the District Court and the United States Court of Appeals for the Fifth Circuit denied bail pending appeal. Upon application to the United States Supreme Court for release on bail pending appeal, Mr. Justice Hugo L. Black, on September 16, 1955, entered an order providing (J. A. 51):

> "That the petitioner, Carlos Marcello be released from custody and admitted to bail until his deportation can be effectuated, Provided, however, that the petitioner shall execute and file with the Clerk of the District Court of the Eastern District of Louisiana a good and sufficient surety in the sum of $10,000.00 conditioned that he will appear for deportation upon three days notice when arrangements for his deportation have been completed, and the Immigration and Naturalization Service notifies him to appear."

The appellant was thereafter released upon posting the required bond. On October 10, 1955, appellant and appellee entered into two stipulations, the first between appellant's counsel, Mr. Jack Wasserman, and the then Solicitor General of the United States, Honorable Simon E. Sobeloff. It provided as follows (J. A. 52):

> "It is hereby stipulated by and between counsel for the respective parties herein that the petitioner will be released upon administrative bail in the amount of

> $10,000.00 conditioned for his delivery into custody for deportation upon three days' notice, that such bond will be substituted for judicial bond previously executed herein and that, in view of the foregoing, counsel herein consent to the vacating of the Order of Mr. Justice Black dated September 16, 1955."

Upon the basis of the above stipulation on October 11, 1955, Mr. Justice Black vacated his prior order (J. A. 47).

Another stipulation was then executed between the parties as part of the understanding for executing the first stipulation. It provided that in view of the release of the appellant by the Immigration and Naturalization Service, the appeal pending in the Circuit Court of Appeals for the Fifth Circuit be dismissed upon the ground of mootness. The appellant was then released upon administrative bond with a penalty of $10,000.00 conditioned, *inter alia*, that he surrender for deportation upon three days' notice by the Immigration and Naturalization Service.

During this period of time, as indicated by appellant's affidavit below, he had not engaged in any criminal or subversive activities, and he had always complied with the requirements made upon him by the Service. The appellee, moreover, has conceded that there has been no evidence of any such activities by the appellant and that there has never been a default by the appellant (J. A. 48, 49). In addition, from June 8, 1953, to April, 1956, (except for two months in 1955) the appellant was able to conduct his business activities, to live in his community and to travel throughout the United States without limitations or restrictions imposed upon him by the Service (J. A. 48).

On April 26, 1956, without warning or cause, the appellant was directed to appear at the Office of the Immigration Service at New Orleans. The administrative bond of October 19, 1955, was cancelled, and an order of supervision was imposed upon him. It provided as follows:

". . . , it is hereby ordered that such alien shall be placed under supervision and permitted to be and to remain at large upon the following terms:

(1) The said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitting to medical and psychiatric examination and or to furnish such information as may be deemed fit and proper.

(3-a) That said alien shall not change (his) (her) place of residence from Jefferson Parish, Louisiana without first securing written permission of the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) at least 48 hours prior to such contemplated change.

(3-b) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) of any change in residence or employment within 48 hours after change is made.

(4) That said alien shall report in PERSON on the first day of each Month at 9:00 (a.m.) to the Officer in Charge of the Immigration and Naturalization Service at Room 918, Masonic Temple, 333 St. Charles Ave., New Orleans, La. The wirtten report shall contain (a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment, (f)

(5) That said alien shall conduct himself in a peaceable, law-abiding manner.

(6) That said alien shall not leave the parishes of Orleans, Jefferson or St. Bernard without first obtaining written or oral permission from a representative of the Acting District Director, New Orleans, La.

(7) That said alien shall not associate or consort

with known criminals, or persons believed by him to be criminals, or persons engaged in criminal activities.

(8) That said alien shall not frequent places or establishments where he knows, or has reason to believe, criminals or persons with a criminal record, congregate."

On May 16, 1956, appellant filed the complaint below seeking a judgment that the order of supervision violated the stipulation entered into between the parties, that the interference with the appellant's liberty is arbitrary, a gross abuse of discretion, illegal and unconstitutional, and enjoining the appellee from enforcing the order of supervision (J.A. 37). Thereafter on May 28, 1956, the appellee issued an amended order of supervision which modified Term No. 6 to read as follows:

"That said alien shall not leave the parishes of Orleans, Jefferson and St. Bernard, Louisiana without furnishing notice, prior to departure, to the Acting District Director, New Orleans, Louisiana, in writing or by telephone, of intention to go beyond the confines of said parishes, and the details of his itinerary (including places and periods of intended stay) during each absence from said parishes; and that, if during any such absence from said parishes, the said alien changes his itinerary (including places and periods of stay) from that furnished in the notice of intended absences, he shall immediately notify the Acting District Director, New Orleans, Louisiana in writing or by telephone of each and every such change."

After the answer of the appellee was filed, the action below came on to be heard upon the appellant's motion for summary judgment and the appellee's cross motion for summary judgment. The District Court denied appellant's motion for summary judgment on December 7, 1956, and

entered judgment for the appellee on January 2, 1956. (J.A. 58).

Following appeal to this Court, the appellee on February 4, 1957, further amended the order of supervision to modify Term No. 3 and Term No. 6 to read as follows (J.A. 59):

> "(3-a) That said alien shall not change his place of residence from *800 Barataria Boulevard, Marrero, Louisiana*, without first securing written permission of the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) at least 48 hours prior to such contemplated change.
>
> * * * * *
>
> "(6) That said alien shall not leave the parishes of Orleans, Jefferson and St. Bernard, unless he first submits to the Acting District Director, Immigration and Naturalization Service, New Orleans, Louisiana, during regular business hours, a written request to leave said Parishes, setting forth in detail the reason or reasons for the request, and giving all the facts of his proposed itinerary (including each full address and period of stay, and the names and addresses of all persons to be visited), and receives prior to departure written permission from said Acting District Director specifying the places which may be visited together with the times and conditions."

Statutes and Regulations

No. 13,653

Supplemental Statutes Involved

Act of February 18, 1931 (46 Stat. 1171, 8 U.S.C. 156a) as amended by Section 21 of the Act of June 28, 1940 (54 Stat. 673, 8 U.S.C. 469) provides:

"That any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this Act) who, after the enactment of this Act, shall be convicted for violation or conspiracy to violate any statute of the United States or of any State, Territory, possession, or of the District of Columbia, taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and deported in manner provided in sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States."

Section 22, Title II of the Act of June 28, 1940, (54 Stat. 673, 8 U.S.C. 155 note) provides:

"No alien shall be deportable by reason of the amendments made by section 20 or 21 on account of any act committed prior to the date of enactment of this Act."

No. 13,655

Section 242(c) of the Immigration and Nationality Act of 1952 (66 Stat. 210; 8 U.S.C.A. 1252-c) reads as follows:

"When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond, in an amount and containing such conditions as the

Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period." If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section . . ."

Section 242(d) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 208, 211, as amended September 3, 1954, 68 Stat. 1232, 8 U.S.C. (1952 ed. Supp. II) 1252(d), provides:

"Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information,

whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

8 Code of Federal Regulations § 242.2(d) [1952 Ed., revised July 1, 1955] provides as follows:

"*Supervision.* An alien against whom a final order of deportation has been outstanding for more than six months shall, pending deportation, be subject to supervision by a district director or officer in charge of a suboffice. An alien placed under supervision shall, among other things, be required to appear from time to time at specified intervals for identification before an officer of the Service; submit, if necessary to medical and psychiatric examination at government expense; give information under oath as to his nationality, circumstances, habits, associations, and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and conform to such reasonable written restrictions on his conduct or activities as may be prescribed."

Summary of Argument

No. 13,653

The principle of res judicata is not applicable to actions for declaratory judgment to review the validity of orders

of deportation. *Rubinstein* v. *Brownell*, 92 App. D.C. 328, 206 F. 2d 449 (C.A. D.C. 1953).

The appellant was nondeportable under the provisions of Section 22 of the Alien Registration Act of 1940, which limited deportation for violations of the Marihuana Tax Act to those convictions which occurred after June 28, 1940. As a nondeportable alien, his status was protected by the savings clause of the 1952 Act. *Catalanotte* v. *Butterfield*, 236 F. 2d 955 (C. A. 6, 1956), pending sub. nom. *Mulcahey* v. *Catalanotte*, No. 435 Supreme Court, October Term, 1956; *United States ex rel. Carson* v. *Kershner*, 228 F. 2d 142 (C.A. 6, 1955), pending sub. nom. *Lehmann* v. *United States ex rel. Carson*, No. 72, Supreme Court, October Term, 1956.

No. 13,655

The stipulation requiring that appellee provide the appellant three days' notice for surrender for deportation is binding upon the appellee. In the absence of any language in the stipulation limiting it as to time, it must be held to be operative until such time as the appellee is able to effectuate the order of deportation. *United States* v. *Town of Clarksville*, 224 F. 2d 712, 713 (C. A. 4, 1955).

The provisions in the order of supervision which require that the appellant may not change his residence without permission of the appellee and that he may not leave the metropolitan area of New Orleans without prior written permission of the appellee are each beyond the appellee's statutory authority. *United States* v. *Witkovich*, 140 F. Supp. 815; (D.C. N.D. Ill. 1956) *Sentner* v. *Colarelli*, 145 F. Supp. 569. (D.C. E.D. Mo. 1956) They are also beyond the constitutional authority of Congress to impose. *Crandall* v. *Nevada*, 6 Wall. 35; *Williams* v. *Fears*, 179 U.S. 270, 274 (1900); *Edwards* v. *California*, 314 U.S. 160 (1941); *Shachtman* v. *Dulles*, 96 USAppDC 287, 225 F. 2d 938 (C.A. D.C. 1955); *Bauer* v. *Acheson*, 106 F. Supp. 445

(D.C. Dist of Col. 1952). They constitute an abuse of discretion. *U. S. ex rel. Heikkinen* v. *Gordon*, 190 F. 2d 16 (C.A. 8, 1951); *Sentner* v. *Colarelli, supra.*

The provisions in the order of supervision which require that the appellant conduct himself in a peaceable, law abiding manner, and forbid his association with criminals or frequenting places where criminals congregate, similarly are beyond the appellee's statutory power and the constitutional power of Congress to impose, being an exercise of local police power. *Patsone* v. *Pennsylvania*, 232 U.S. 138 (1913); *Ohio ex rel. Clarke* v. *Deckebach*, 274 U.S. 392 (1926). The prohibitions, in addition, are so vague and indefinite as to be void under the due process clause of the Fifth Amendment. *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1938).

ARGUMENT

No. 13,653

I

Appellant's brief in No. 13,595 presents his argument with respect to the issues of res judicata and the availability of relief from a prior judgment under Rule 60(b) of the Federal Rules of Civil Procedure.

II

Appellant, As An Alien Who Was Not Deportable Prior to the Enactment of the 1952 Act, Has a Non-Deportable Status Which Is Preserved by the Savings Clause

The appellant entered the United States lawfully for permanent residence as an eight-month-old infant in 1910. In 1938 he was convicted of a violation of the Marihuana Tax Act of August 2, 1937 (26 U.S.C. 2591). It is conceded by appellee, and the Court below held (J.A. 27, No. 13,595), that the appellant was not amendable to the deportation laws from that date until the enactment of the

Immigration and Nationality Act of 1952. The Court below, however, held that the appellant's 1938 conviction rendered him deportable under the provisions of Section 241(a)(11) and Section 241(d) of the 1952 Act.

The issue presented here is whether the savings clause, Section 405(a) of the 1952 Act protects the appellant from deportation.

The determination of this issue requires a review of the narcotic deportation laws, together with an examination of the pertinent provisions of the Act of 1952.

The first statute subjecting aliens to deportation for violation of the narcotic laws was the Act of May 26, 1922 (42 Stat. 596). Deportation was provided for those aliens who had been convicted of a violation of the Narcotics Importation Act (35 Stat. 614) (1909), as amended (21 U.S.C. 173), regardless whether the conviction was prior or after the Act of 1922. The Act of February 18, 1931 (46 Stat. 1171, 8 U.S.C. 156a), thereafter reached for deportation those aliens who had been convicted, *after* the enactment of that Act, of a violation of the Harrison Act, 38 Stat. 785, as amended, Section 4701, Internal Revenue Code 549, regulating the manufacture and sale and prescribing taxes upon opiates and coca leaf drugs. The Marihuana Tax Act of 1937 (50 Stat 551, 554, Section 474, Internal Revenue Code 560), required stamp taxes, registration, and the payment of special transfer taxes upon the sale of marihuana.

The issue next was considered during the 76th Congress. During the first sessison H.R. 5138 was passed by the House of Representatives, and thereafter reported to the Senate unchanged by the Senate Judiciary Committee. *Senate Report 1154*, 76 Cong. 3rd Sess. It amended the Immigration Act of 1917 to provide that any aliens who after entry have been convicted of a violation of any narcotic laws shall be deportable, both retrospectively and

prospectively. H.R. 5138 as reported by *Senate Report 1154*, however, was found to be objectionable for a variety of reasons (see *Klig* v. *Brownell*, No. 12,846, appeal pending in this Court), among which was the retrospective effect it would have upon aliens who had previously committed violations of the narcotic tax laws. The original bill as reported was, therefore, recommitted to the Senate Judiciary Committee and rewritten. The new version expressly provided at Section 22 that the deportation provisions for narcotic violations shall not be applicable to "any act committed prior to the date of the enactment of this Act." 54 Stat. 673. See *Senate Report 1796*, 76th Cong. 3rd Session.

There was thus a determination by Congress that aliens who had committed violations of the Marihuana Tax Act prior to the Act of 1940, that is, between August 2, 1937, and June 28, 1940, shall not for that reason be deportable. This determination was consistent with the prior provisions of the Act of 1931, supra, which also was prospective only in its effect.

The next statute to be adopted was the Immigration and Nationality Act of 1952. It includes four pertinent provisions:

(1) At Section 403(a)(31) it repeals the Act of 1931, as amended by the Act of June 28, 1940.

(2) At Section 405(a) it provides, so far as relevant here:

> "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed . . . to affect . . . any status (or) condition . . . existing at the time this Act shall take effect; but as to all such . . . statutes (statuses) (or) conditions . . . the statutes or parts of statutes repealed by his Act are, unless otherwise specifically provided therein, hereby continued in force and effect . . ."

(3) At Section 241(a)(11) it provides that

> "Any alien in the United States . . . shall, upon order of the Attorney General, be deported . . . who has been convicted of a violation of any law . . . governing or controlling . . . the taxing . . . of . . . marihuana. . ."

(4) At Section 241(d) it provides:

> "Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding . . . (2) that the facts, by reasons of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of the enactment of this Act."

The narrow question to be determined, therefore, is whether the following phrase contains language which *specifically provides* that appellant's status as a non-deportable alien under Section 22 of the Alien Registration Act shall be affected, or that as to such status, the Alien Registration Act shall not be continued in force and effect:

> "Any alien in the United States . . . shall . . . be deported . . . who has been convicted of a violation of any law governing or controlling the taxing . . . of marihuana . . . notwithstanding that the facts . . . by reason of which . . . such alien . . . (has been so convicted) . . . occurred prior to the date of the enactment of this Act."

That the *notwithstanding* clause in the foregoing phrase lacks the specificity required by the saving clause seems plain enough from a mere reading of it. But when examined in the context of the preceding deportation provisions,

and of Section 22 of the Alien Registration Act, and against the demands of the savings clause, there can be no doubt that Section 241(d) does not specifically provide that the appellant's status as a non-deportable alien has been terminated by the 1952 Act.

Appellant's status is governed by two "specific provision" requirements set forth in the savings clause. One relates to the status or condition of the alien: Unless otherwise specifically provided, nothing contained in the 1952 Act shall be construed *to affect any status (or) condition* existing on the effect date of the Act.

The second provision, which reinforces the first, relates to the continued effectiveness of Section 22 of the Alien Registration Act. As to all such statuses or conditions, *the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect.*

Thus, the savings clause demands specific language not merely to "affect" the appellant's status, but also demands a specific provision stating that Section 22 of the Alien Registration Act is not continued in force and effect.

In view of these linked provisions, the familiar rule of statutory construction requires that the general language which has been used in Section 241(d) to encompass all of the numerous classes of aliens described in Section 241(a),[1] must succumb, even were there a conflict, to the specific provisions of the savings clause.

As the Supreme Court declared in *MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1943):

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[1] The former Commissioner of the Immigration and Naturalization Service has testified that the 1952 Act sets forth over 700 different grounds of deportation and that under the prior laws there were 465 such grounds. Hearings, Senate Appropriations Committee on Department of Justice Appropriation for 1954, 83rd Cong., 1st Session p. 250 (1953).

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which might otherwise be controlling.' *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208"

In *National Labor Relations Board* v. *Jones and Laughlin*, 301 U.S. 1, 30 (1936), the Supreme Court stated the same principle earlier:

"(Courts) are not at liberty to deny effect to specific provisions which Congress has the constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. *The cardinal principle of statutory construction is to save and not to destroy.*" (Italics supplied)

But for the ruling below and the decision in *Gaglione* v. *Bonds*, 222 F. 2d 958 (C.A. 5, 1955, cert. denied 350 U.S. 902) every Court which has passed upon this issue has resolved it in accordance with the foregoing principles, favorably to the alien.

Catalanotte v. *Butterfield*, 236 F. 2d 955 (C.A. 6, 1956), pending in the Supreme Court sub nom. *Mulcahey* v. *Catalanotte*, No. 435, October Term, 1956, involved the identical question presented in this appeal. The Court there concluded:

". . . that Catalanotte's status of nondeportability is protected by Section 405 of the Act, since the statutory provisions upon which the government relies do not constitute such specific exceptions to Section 405 as are contemplated in that Section in order to make it inapplicable." at Page 958.

See also: *United States ex rel. Carson* v. *Kershner*, 228 F. 2d 142, pending in the Supreme Court, sub nom. *Lehmann* v. *United States ex rel. Carson*, No. 72, October 1956 Term; *United States ex rel. Sciria* v. *Lehmann*, 136 F. Supp. 458 (D.C.N.D. Ohio, 1955); *United States ex rel DeLuca* v. *O'Rourke*, 213 F. 2d 758 (C.A. 8, 1954); *Ex parte Robles-Rubio*, 119 F. Supp. 610 (D.C.N.D. Cal. 1954).

There can be no question that these decisions correctly apply the savings clause in view of the Supreme Court's decisions in *United States* v. *Menasche*, 348 U.S. 528 (1954), and in *Shomberg* v. *United States*, 348 U.S. 540 (1954). In *Menasche* the Supreme Court declared that:

> "The whole development of this general savings clause . . . manifests a well-established congressional policy not to strip aliens of advantages gained under prior laws." At page 535.

The present appeal especially presents an illustration of this congressional policy. As has been noted earlier, Congress had originally considered legislation (H.R. 5138, 76th Cong., 1st Sess.) which retroactively provided for the deportation of aliens who had committed violations of the Marihuana Tax Act. But following Senate reconsideration of that bill, it was rewritten expressly to declare that its deportation provisions for violations of the Marihuana Tax Act shall be prospective only. It is noteworthy that a distinction was made between narcotic tax act violators and subversives. While the deportation for the former operated prospectively only, as to the latter Congress adopted a retrospective policy. See Section 23, Act of June 28, 1940, supra.

Moreover, this Congressional policy is evidenced by the legislative scheme for violators of the narcotic laws. The specific provisions of 241(a)(11), as well as the prior Acts

of 1922 and 1931, indicate a different classification for those aliens who are addicts, those aliens who violated the laws dealing with illicit traffic (Narcotics Importation Act, supra), and those aliens who violated laws dealing with the regulation and taxation of narcotics (Harrison Act, supra, and Marihuana Tax Act, supra).

As to addicts, Section 241(a)(11) specifies deportability only for those who *are, or hereafter at any time after entry have been,* narcotic drug addicts.

As to traffickers, it requires deportation for those violators of the illicit traffic laws who have been so convicted *at any time.*

As to narcotic tax violators, however, the clause *at any time* is omitted. Deportation is specified only for those aliens *who have been convicted* of the narcotic tax and regulation laws.

The provision with regard to addicts was new to the Act of 1952. However, the clauses dealing with traffickers and tax violators were carried forward from the prior Act of 1922, the Act of 1931, and the Marihuana Tax Act of 1937.

There is thus a clearly expressed congressional policy with regard to narcotic tax violators that the deportation laws shall not operate retrospectively. This is reinforced, as we have indicated above, in the case of the Marihuana Tax Act violators in view of the specific legislative history preceding the adoption of the Alien Registration Act.

Against these specific and express provisions, the appellee tilts the general, 700-ground-covering-phrase in 241(d)(2) to establish the appellant's deportability.

Apart from the problems which are posed by the use of the general phrase to overcome the specific, (discussed above, *MacEvoy* v. *United States, supra,* and other cases cited), this Court itself has pointed out the weight which should be given to "slight negative implications."

In *Foradis* v. *Brownell*, No. 13,216, decided January 17, 1957, this Court recalled that the Supreme Court in the *Menasche* decision weighed a "slight negative implication" of Section 405(b) against the "broad sweep" of Section 405(a). The *negative implication* in *Foradis* was held not strong enough to overcome the sweep of the savings clause.

If the implication in *Foradis* was weak, whatever negative implication there may be in Section 241(d) is utterly impotent. For in *Foradis* the savings clause itself contained express language suggesting, however weakly, one effective date for its operation rather than another. But in the present appeal, express words are completely absent to suggest that the appellant's status has been terminated or that the pertinent part of the Alien Registration Act has no been continued in force and effect.

Moreover, when compared with the "specific provisions" which were found to have met the requirements of the savings clause in *Shomberg* v. *United States*, *supra*, Section 241(d) falls far short of meeting "degree of specificity" which is required in this context. *Wong Kau Suey* v. *Brownell*, 97 App. D.C. 26, 227 F. 2d 41 (C.A.D.C. 1955), cert. denied, 350 U.S. 969.

Where Congress has chosen to use such express provisions as "Notwithstanding the provisions of Section 405(b)" in Sections 311, 313(a), 315(a), 318, and 331 of the Act, in the light of its determination to save for aliens the advantages they had acquired under prior legislation, no language short of an equally express statement should be held to overcome the savings clause.

For these reasons, it is respectfully submitted that the Court below erred in granting summary judgment for the appellee.

No. 13,655

III

The Decision Below Erroneously Interprets the Stipulation of the Solicitor General

The contention below, accepted by the Trial Court, was that the stipulation between counsel and the Solicitor General was binding no longer.

The terms of the stipulation, upon which prior litigation between the parties herein was concluded, expressly provided that the appellant

> "be released upon administrative bail in the amount of $10,000.00, conditioned for his delivery into custody for deportation upon three days' notice." (J.A. 52).

Thereafter, a bond was entered on October 19, 1955, giving effect to the terms of the stipulation. It provided, inter alia:

> ". . . In the event the said alien is released from custody *either pending final determination of the alien's deportability or after a final order of deportation has been made*, the conditions of this obligation are . . . (2) that if the above-bounden obligors . . . shall cause the said alien to be delivered into the actual physical custody of an immigration officer upon three days notice and pursuant to his request . . . for deportation if an order of deportation has been made against said alien, and said alien is accepted by such immigration officer, then this obligation shall be void; otherwise it shall remain in full force and virtue: . . ." (Italics supplied).

The provisions in both the stipulation and the bond requiring that three days' notice be given to the appellant for

his delivery to custody for deportation, are explicit, unambiguous, and unqualified. Notwithstanding these agreements, the appellee on April 26, 1956, terminated the bond, placed the appellant under an "Order of Supervision," and refused to continue in force in the order of supervision a requirement that three days' notice be given appellant for delivery into custody for deportation. In ostensible explanation for his refusal to be bound by the stipulation, the appellee, acting through Acting District Director Sam Bernsen, advised appellant's counsel on May 3, 1956:

> "It is our understanding that the three-day notice provision placed in the administrative bail bond pursuant to your stipulation with the Solicitor General ran only for the period during which judicial proceedings were pending in Marcelle's case and for the six month period thereafter during which the Attorney General had authority under Section 242(c) of the Immigration and Nationality Act to detain Marcello or require him to post a substantial bond to ensure his appearance when required by the Service for deportation." (J.A. 49)

The reply to appellee's contention is twotold:

First, if there were any understanding that the requirement of three days' notice was to run only for a given period, it was not set forth in the stipulation. It can not now be inserted.

The language of the Fourth Circuit in *United States v. Town of Clarksville*, 224 F. 2d 712, 713 (C.A. 4, 1955), is appropriate here because there too the Court was concerned with the effect of a stipulation in which certain understandings were said to have been omitted:

> "Counsel contends that (a particular) provision would have been includued in the stipulation if it had

> been thought of. The answer to this, then, is that counsel should have thought of it. From the stipulatoin it is not clear that such matters were not considered. . . Both sides were represented by counsel during these negotiations; we cannot now consider (the appellee's) bargain as if it had been blindly made. The stipulation was entered into fairly and freely by both parties. Accordingly, the stipulation is binding and we must enforce it."

In the face of a stipulation which unequivocally provides, without limitation as to time, for three days notice prior to appellant's delivery into custody for deportation, the appellee should not now be permitted to amend the stipulation to make it operative for a limited time only.

Second, if it is the appellee's understanding that the stipulation is intended to run, as he states, "only for the period during which judicial proceedings were pending in Marcello's case and for the six-month period therafter," then the stipulation is operative, for there is presently pending in this Court a judicial proceeding, brought to review the validity of the order of deportation against the appellant. *Marcello* v. *Brownell*, No. 13,595.

That this proceeding in the third such action can not affect the appellee's interpretation of his stipulation. His agents have stated in the letter of May 3, 1956 to the appellant's counsel that the stipulation was effective during the period of judicial review of the deportation order and six months thereafter, supra.

Thus appellee concedes, as he must, that the stipulation was binding not only until after the first judicial proceeding, but until after the second judicial proceeding. The appellee's action in terminating the bond was based upon the termination date of the *second* proceeding, namely, October 25, 1955. Moreover, the appellee conceded in the trial

court that not until the termination of the *second* proceeding was there a "final disposition of a judicial proceeding brought to review the final order of deportation issued for plaintiff's deportation . . . within the meaning of Section 242(c) of the Act." (See Defendant's Memorandum of Points and Authorities, page 7).

If there was not a "final disposition" of a judicial proceeding while the second action was pending, a fortiori, there has not been a "final disposition" of a judicial proceeding while the third action is pending.

Accordingly, the terms of the stipulation should be held to be binding upon the appellee at the present time.

IV

The Order of Supervision Is Arbitrary and Unconstitutional

The Order of Supervision issued by the defendant on April 26, 1956, as amended on May 28, 1956, and as amended February 4, 1957, provides that the appellant shall be placed under supervision and permitted to be and to remain at large upon the following terms (J.A. 62):

> "(1) That said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.
>
> (2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitting to medical and psychiatric examination and or to furnish such information as may be deemed fit and proper.
>
> (3-a) That said alien shall not change his place of residence from 800 Barataria Boulevard, Marrero, Louisiana, without first securing written permission of the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) at least 48 hours prior to such contemplated change.

(3-b) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) of any change in residence or employment within 48 hours after change is made.

(4) That said alien shall report in PERSON on the first business day of each month at 9:00 a.m. to the Officer in Charge of the Immigration and Naturalization Service at Room 918 Masonic Temple Bldg., 333 St. Charles St., New Orleans La. . . .

(5) That said alien shall conduct himself in a peaceable law-abiding manner.

(6) That said alien shall not leave the Parishes of Orleans, Jefferson and St. Bernard, unless he first submits to the Acting District Director, Immigration and Naturalization Service, New Orleans, Louisiana, during regular business hours, a written request to leave said Parishes, setting forth in detail the reason or reasons for the request, and giving all the facts of his proposed itinerary (including each full address and period of stay, and the names and addresses of all persons to be visited), and receives prior to departure written permission from said Acting District Director specifying the places which may be visited together with times and conditions.

(7) That said alien shall not associate or consort with known criminals, or persons believed by him to be criminals, or persons engaged in criminal activities.

(8) That said alien shall not frequent places or establishments where he knows, or has reason to believe, criminals or persons with a criminal record, congregate."

No challenge is made regarding the validity of the requirements set forth in terms (1), (2), (3-b), and (4). Appellant concedes that the provisions that he produce himself for deportation and for physical examination, that he

give notice as to any change in residence or employment, and that he make a monthly report to the Immigration and Naturalization Service are necessarily related to the appellee's power to assure that the appellant will be available for deportation. *United States* v. *Witkovich*, 140 F. Supp. 815 (D.C. N.D. Ill. 1956), appeal pending, No. 295, United States Supreme Court, October Term, 1956; *Sentner* v. *Colarelli*, 145 F. Supp. 569, 577 (D.C. E.D. Mo. 1956).

However, the remaining requirements are each arbitrary and exceed the statutory and constitutional authority of the Attorney General. The appellant is fortified in his position by the fact that each of the three decided cases on this issue have been resolved in favor of the position of the alien. In *Nukk* v. *Shaughnessy*, 350 U.S. 896 (1955), the Supreme Court held that a challenge of the validity of an order of supervision presented a justiciable controversy and a cause of action. In *United States* v. *Witkovich*, *supra*, the District Court dismissed an indictment for violation of the terms of an order of supervision upon the ground that the terms imposed upon the alien by the Attorney General were beyond his statutory authority because they did not relate to the alien's availability for deportation. The sole other decision on this issue, *Sentner* v. *Colarelli*, *supra*, similarly held that those terms in the order of supervision which did not relate to availability for deportation were invalid.

The present appeal is the fourth reported case presenting the question of the validity of the terms of an order of supervision. The test of validity of the terms of an order of supervision, as each of the decisions has held, is whether they are related to the power of the Attorney General either to deport the appellant, or to assure (by such supervision as is necessary) that he will be available for deportation. *United States* v. *Witkovich*, *supra*; *Sentner* v. *Colarelli*, *supra*.

So tested, each of the challenged provisions is invalid.

(A) As drawn, Term 3-a requires appellant to obtain written permission of the Service at least 48 hours prior to a contemplated change of residence. Term 6 is more restrictive. It forbids the appellant to "leave" the parishes of Orleans, Jefferson and St Bernard without first:

> (1) Submitting a written request to the Service
> (2) during regular business hours
> (3) stating "in detail reasons for the request and giving all the facts of his proposed itinerary (including each full address and period of stay, and the names and addresses of all persons to be visited," and
> (4) receiving prior to departure written permission specifying the places which may be visited together with times and conditions.

Clearly, there is no authority in the Act, express or implied, for vesting in the Attorney General the power to determine whether aliens may change their place of residence or, absent imminent deportation, for confining them to the bounds of a particular area.

As the District Court held in the *Witkovich* case, *supra*, at p. 826: "The Attorney General has been given power to supervise the alien to make sure he is available for deportation, and no further power." There appears to be no reason why the Attorney General could not supervise an alien under an order of deportation in one immigration district as well as in another. *Sentner* v. *Colarelli*, *supra*. The power to supervise the appellant's availability for deportation is not the power to determine where he shall live. See also: *Gegiow* v. *Uhl*, 239 U.S. 3, 9, 10 (1915).

Nor is the power to supervise an alien the power to forbid his travel unless such travel would prevent the execution of a warrant of deportation. The power which appellee seeks to exercise here, however, goes far beyond as-

suring that the appellant will be available for deportation. He asserts the power to probe into the *reasons* for the appellant's departure beyond the confines of Metropolitan New Orleans, to veto the places which the appellant may visit, to pass upon the persons whom he shall visit, and to impose unstated "conditions" upon his departure from the three parishes. The exercise of none of these powers concerns the appellant's availability for deportation. The terms imposed upon the appellant by the order of supervision are therefore beyond the appellee's statutory authority. *United States* v. *Witkovich*, *supra*; *Sentner* v. *Colarelli*, *supra*.

Moreover, even a statutory grant of power to the Attorney General to determine the residence and to restrict the travel of aliens would raise a substantial question as to its constitutionality. So long as aliens are permitted to remain in the United States, whether prior to an order of deportation [*Truax* v. *Raich*, 239 U.S. 33 (1915)], pending an order of deportation [*Carlson* v. *Landon*, 342 U.S. 524, 537 (1951)], or after an order of deportation (*Sentner* v. *Colarelli*, *supra*), they are entitled "to the safeguards of the Constitution and to the protection of the laws in regard to their rights of person and of property, and to their civil and criminal responsibility." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 724 (1892).

The right to change one's residence and the right to travel are obviously within the protection of the Fifth Amendment to the Constitution for persons who are aliens as well as for persons who are citizens. *Crandall* v. *Nevada*, *supra*; *Williams* v. *Fears*, *supra*; *Edwards* v. *California*, *supa*; *Shachtman* v. *Dulles*, *supra*; *Bauer* v. *Acheson*, *supra*.

(B) *The terms imposed are an abuse of discretion.* In the particular circumstances presented in this appeal, even were the Attorney General to have statutory and constitu-

tional authority for determining the residence and conditions of travel of the appellant, the conditions set forth in Term 6 are unreasonable and an abuse of discretion. If the appellant is entitled to three days' notice as provided in the stipulation herein, as has been argued above, the only requirement reasonably related to the power to deport would be a provision that appellant inform the Service of any travels and any temporary or permanent change in address for a period in excess of three days.

The severe limitations which the appellee seeks to impose are not justified by any conduct on the part of the appellant. The uncontradicted affidavit of the appellant (J.A. 46) has set forth the following facts:

The parishes of Orleans, Jefferson, and St. Bernard comprise what is known as Metropolitan New Orleans. The appellant, who has lived in the Metropolitan area of New Orleans since 1910, is engaged in three business activities: the rental of music machines, the operation of a motel, and the buying, selling, and management of real estate properties. These business activities require that he visit prospective customers and that he inspect his properties, as well as possible investment opportunities. Many of his business appointments are made without advance notice during evenings and over weekends. In addition, appellant's immediate family in the New Orleans area includes a sister who lives with her husband and children within a few miles of the appellant's residence but outside the three parishes to which the appellant is limited.

The requirement that the appellant make a prior, written request during regular business hours and receive permission of the Acting District Director of the Service before he can make any trips outside the three parishes has impeded the conduct of the appellant's business, has been unnecessarily onerous, and has constituted an unjustified

interference in his private, lawful activities. Inasmuch as many of the places to which the appellant goes and many of the persons whom he visits are casual in nature and without advance planning and scheduling, the requirement that the appellant list the names and addresses of those whom he visits is burdensome and a nearly impossible requirement to fulfill.

Appellant was at liberty upon an immigration bond from December 30, 1952, to June, 1953. This bond restricted him to the State of Louisiana. From June 8, 1953, to August 17, 1955, he was at liberty on a $10,000 judicial bond which did not restrict his movements in the United States. From August 17, 1955, to September 16, 1955, he was detained for deportation even though the Immigration Service had no travel documents. From October 16, 1955, to April 26, 1956, he was at large on an administrative bond of $10,000 which did not restrict his movements. From April 26, 1956, until May 28, 1956, he was required to obtain written permission in advance to leave the City of New Orleans. From May 28, 1956 to February 4, 1956, he was required to notify the Immigration Service if he left New Orleans, but no written or oral permission was required. Since February 4, 1957, he is again required to secure written permission to visit outside of New Orleans. Appellant has never been given any explanation for these administrative changes. No reasons have been advanced as to the basis for the restriction to the City of New Orleans. The changes have always been made without notice or hearing.

As the affidavit sets forth, from 1953 to the imposition of the order of supervision by the appellee in 1956 (except for two months in 1955), the appellant had no travel restrictions. He was able to and did travel throughout the State of Louisiana and the United States without need for the leave of the Service. He was able to conduct his business and visit his friends and relatives without subjecting his

business and social life to the inquisitorial scrutiny of immigration officers. Nor was there any reason for any restrictions, for the appellant had sworn in his affidavit below, and the appellee had conceded, that he had not been engaged in any criminal or subversive activities and that he had always complied with the requirements of the Immigration and Naturalization Service.

No ground has been shown by the appellee, either in any administrative proceedings or in the Court below, for imposing these severe restrictions upon the appellant's movements. There has been no suggestion that the appellant will flee or hide, or that he has ever failed to comply with the terms of his bond or of the order of supervision. There has therefore been no change of circumstances to warrant the imposition of additional restrictions upon the activities of the appellant.

"An alien, not shown to be engaging in unlawful activity and having no proclivity to escape," Mr. Justice Douglas has ruled, is entitled to bail. *Yanish* v. *Barber*, 97 L. Ed. 1937; *Carlisle* v. *Landon*, 97 L. Ed. 1642 (Applications for bail pending appeal). Appellant who is being confined to Meteropolitan New Orleans, is entitled to similar protection in the absence of any showing of criminal activities or proclivity to escape. See also: *U.S. ex rel. Heikkinen* v. *Gordon*, 190 F. 2d 16 (C.A. 8, 1951), dismissed as moot, 314 U.S. 870; *Sentner* v. *Colarelli*, *supra*.

(C) The requirements set forth in Terms 5, 7, and 8 that the appellant shall conduct himself in a peaceable law-abiding manner, and shall not associate with known criminals, or persons believed by him to be criminals or engaged in criminal activities, or frequent places where such persons congregate, obviously have no relation to the Attorney General's power to deport the alien. The Attorney General has conceded as much. In his brief in the United States Supreme Court, in *United States* v. *Witkovich*, *supra*, he ar-

gues that the statute permits "supervision and questioning, not only to assure availability for deportation, but also for control of harmful activities. . . " Page 13.

As has been argued above, no such power is conferred by the statute. To impute the power "to control harmful activities" by aliens in the absence of any express provision in the Act, as the Court held in the *Sentner* decision, suggests that Congress sought to add penalties to crimes when committed by deportable aliens but not when committed by other persons, and that it therefore "delegated to the Attorney General the power to delegate to the local Officer-in-Charge the power to decide whether in the case of any individual deportable alien, it would be wise to promulgate an order which adds another count to any possible indictment for violation of (any) laws." "It is hardly conceivable," the Court declared, "that Congress sought to authorize the Attorney General, through his subordinates, to duplicate criminal provisions already on the statute books." 145 F. Supp. at 576.

Apart from the question whether the statute permits the Attorney General to "control harmful activities," the stricture upon the appellant to conduct himself in a peaceable, law-abiding manner and to eschew the company of criminals and the places in which they meet, assuming its validity as an exercise of *any* police power, is manifestly within the local police power. See *Patsone* v. *Pennsylvania*, 232 U.S. 138 (1913); *Ohio ex rel Clarke* v. *Deckebach*, 274 U.S. 392 (1926); *Sentner* v. *Colarelli*, *supra*. Whatever plenary power Congress may have to expel aliens (*Fong Yue Ting* v. *United States*, *supra*); whatever war power Congress may have to control enemy aliens (*Ludecke* v. *Watkins*, 335 U.S. 160 (1947)); whatever sovereign power there may be to control the activities of aliens "charged with a philosophy of violence against this Government," (*Carlson* v.

Landon, 342 U.S. 524, 542 (1951)), no judicial decision has ever suggested that there is a *national* police power governing aliens, and that conduct which is within the local police power, and which Congress may not prohibit to citizens, it may punish as to aliens. Even as to the claim of power to control the activities of subversive aliens, the Attorney General has relied upon no judicial authority. His position stated with candid succinctness is: "The short of it is that the special status of deportable aliens who have not yet been deported justifies some form of special treatment," Page 36, Brief for the United States, *United States* v. *Witkovich*, *supra*. Needless to say, more than this is required to overturn deeply-rooted constitutional principles.

An additional constitutional impediment in the order of supervision arises from its vagueness and its failure to set forth an ascertainable standard of guilt. The term "criminal" is a "word of broad significance and includes those who have committed an offense of the most trifling infraction as well as those guilty of the most heinous crimes." *Colorado* v. *Maxwell*, 125 F. Supp. 18, 22 (D.C. Col. 1954). The phrase, "known criminal," like the phrase, "known to be a member" (of a gang), is ambiguous. Of the latter phrase, the Supreme Court declared in *Lanzetta* v. *New Jersey*, 306 U.S. 451, 458 (1938), that it creates:

> "doubt whether active or putative association is meant. If actual membership is required, that status must be established as a fact, and the word 'known' would be without significance. If reputed membership is enough, there is uncertainty whether that reputation must be general or extend only to some persons."

No standards whatever have been set forth to determine the limits of the appellant's associations. Is the appellant forbidden to consort with violators of a traffic ordinance or

those offenders only who have committed "heinous crimes," or both? Does the ban apply to those who have had past convictions but are now rehabilitated in society? Is the appellant to determine what persons are engaged in a "criminal activity," or must the question whether the activity is "criminal" await a conviction of the person for a criminal offense? How many "criminals" must gather at a place before it is a "place where criminals congregate"? Is the appellant barred from such place always or only when there is a "congregation of criminals"? The very vagueness of the order of supervision condemns the appellant at his peril to a life of solitude.

What the Supreme Court said in the *Lanzetta* case applies here:

> "The terms it employs to indicate what it purports to denounce are so vague, indefinite, and uncertain that it must be condemned as repugnant to the due process clause. . ." *Lanzetta* v. *New Jersey*, *supra*.

Conclusion

For the foregoing reasons the District Court erred in entering judgments for the appellee. The judgments below should be reversed.

Respectively submitted,

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No. 13,653

JOINT APPENDIX

JOINT APPENDIX

IN THE

Motion to Dismiss or in the Alternative for Summary Judgment

(Filed October 31, 1956)

Comes now the defendant by his attorney the United States Attorney and moves this Court for an order dismissing the above-entitled action or in the alternative entering summary judgment for the defendant for the reasons that on the facts and the law the complaint fails to state a claim upon which this Court may grant relief and the complaint is barred by *res judicata*. This motion is based on the pleadings and affidavits filed in this action and the records and opinions in previous litigation in this Circuit, the Fifth Circuit and the Supreme Court involving the same parties and subject matter, all of which must be judicially noticed by this Court and are incorporated herein and made a part of this motion.

Wherefore, it is respectfully submitted that summary judgment be granted defendant and the complaint dismissed.

Oliver Gasch,
United States Attorney.

Order

(Filed December 7, 1956)

The above-entitled cause having come on for hearing on defendant's motion for summary judgment and plaintiff's opposition thereto, and counsel having been heard, and the pleadings and affidavits filed herein, and the proceedings and final judgment in Civil Action No. 2673-55 in the United States District Court for the District of Columbia Circuit, and the proceedings and final judgment in Miscellaneous Action No. 854-54 in the United States District Court for the Eastern District of Louisiana having been considered, and

It appearing to the Court that by virtue of these aforementioned proceedings the issues sought to be litigated herein are *res judicata*, and it

Further appearing that the situation was one where according to sound judicial discretion controlling weight should be given to the prior judgments, and it

Further appearing that there is no justification for relief from these judgments under Federal Rules of Civil Procedure, Rule 60(b), and that in any event such application was not timely made, and it

Further appearing that the issues raised in the present complaint are without merit and that the order of deportation is valid, and that there is no genuine issue as to any material fact but that defendant is entitled to judgment as a matter of law it is by the Court this 7 day of December 1956

Ordered that the defendant's motion for summary judgment be and it is hereby granted and the amended complaint herein dismissed.

BURNITA SHELTON MATTHEWS,
Judge.

NOTICE OF APPEAL

(Filed December 14, 1956)

Notice is hereby given that the plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order of the District Court granting defendant summary judgment and entered on December 7, 1956.

JACK WASSERMAN,
Attorney for Plaintiff.

Copy to: Oliver Gasch, Esquire, United States Attorney, Attorney for Defendant.

No. 13,655

JOINT APPENDIX

JOINT APPENDIX

COMPLAINT

(Filed May 16, 1956)

Carlos Marcello, complaining of the defendant, respectfully alleges:

1. That the plaintiff was born in Tunis, Africa, on February 6, 1910.

2. That the defendant, Herbert Brownell, Jr., the Attorney General of the United States, is charged with the statutory duty to parole deportable aliens and to supervise the administration of the immigration laws and to supervise and direct the administration of the Immigration and Naturalization Service.

3. That the plaintiff came to the United States for permanent residence on October 7, 1910, and has resided here ever since.

4. That plaintiff is married to an American citizen and is the father of four American born children.

5. That deportation proceedings were instituted against plaintiff on December 30, 1952, and a final order of deportation has been issued herein.

6. That the defendant has been unable to effectuate plaintiff's deportation.

7. That there is no place to which plaintiff may be deported at the present time or in the immediate future.

8. That plaintiff has lived in the United States for over forty years, and has all his family ties here.

9. That from December 30, 1952, until April 26, 1956, except for a short period when defendant ordered plaintiff detained for deportation (which detention was held unjustified by Mr. Justice Hugo L. Black), plaintiff has been at large under bond and was permitted to travel throughout the United States.

10. That during the aforementioned period, plaintiff did not engage in any subversive or criminal activities and has always abided by the conditions of his bail upon which he was released by the Courts and the defendant.

11. That on October 10, 1955, in the Supreme Court, in the case of *U.S. ex rel. Carlos Marcello* v. *Nabers*, defendant through the Solicitor General stipulated with plaintiff's attorney that plaintiff would be released upon $10,000 bail pending deportation and that he would be given three days' advance notice of any contemplated deportation.

12. That upon the basis of the aforesaid stipulation, plaintiff agreed to withdraw court litigation pending in the Fifth Circuit Court of Appeals.

13. That pursuant to the aforesaid stipulation, plaintiff was permitted to travel freely throughout the United States until April 26, 1956.

14. That on April 26, 1956, defendant through his agents repudiated the aforesaid stipulation over plaintiff's protests and ordered plaintiff restricted to the Parishes of Orleans, Jefferson and St. Bernard in the City of New Orleans, and has further advised plaintiff that he will not be given any advance notice of deportation if it can be effectuated.

15. That the restriction of plaintiff's movement to the City of New Orleans hampers plaintiff in carrying on his music box and real estate business without special permission from defendant's agents and prevents him from visiting his sister who resides thirteen miles away.

16. That no charges were given plaintiff and no hearing was accorded him to establish the necessity for this interference with his freedom of movement.

17. That no facts exist warranting a change in the parole conditions of plaintiff. On the contrary, plaintiff has complied with the law and has abided by all parole conditions ever since the institution of deportation proceedings against him in 1952.

18. That the order of April 26, 1956, repudiating the aforesaid Supreme Court stipulation and restricting plaintiff's liberty of movement is contrary to law, arbitrary, an abuse of discretion, and unconstitutional.

19. That the aforesaid restraint upon plaintiff's liberty without a hearing or notice of charges against him:

(a) Is contrary to the Supreme Court stipulation herein.

(b) Interferes with plaintiff's family and business life and violates his constitutional rights.

(c) Is causing plaintiff irreparable injury.

WHEREFORE, plaintiff respectfully requests a judgment:

(a) Declaring that defendant is violating the stipulation entered into between plaintiff and defendant's agents in the Supreme Court.

(b) Declaring the interference with plaintiff's liberty is arbitrary, a gross abuse of discretion, illegal and unconstitutional.

(c) Declaring that the denial of hearing or notice of charges to plaintiff is illegal and unconstitutional.

(d) Enjoining defendant from enforcing his order of April 26, 1956.

(e) For such other and further relief as may be proper.

JACK WASSERMAN,
Attorney for Plaintiff,
902 Warner Building,
Washington 4, D. C.

ANSWER

(Filed June 27, 1956)

Now comes the defendant by his attorney, the United States Attorney, and answers the complaint of plaintiff as follows:

First Defense

Answering the allegations of plaintiff's complaint, defendant avers:

1. Admitted.
2. Admitted.
3. Admitted. Except it is alleged that defendant has been absent from the United States since his admission thereto in 1910.
4. Admitted.
5. Admitted. Defendant further avers that after hearings the Special Inquiry Officer on February 20, 1953, entered an order finding plaintiff deportable on the following grounds:

"The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of a law relating to the illicit traffic in narcotic drugs, to wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress; and The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marijuana, to wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress."

From this order, plaintiff appealed to the Board of Immigration Appeals. The Board dismissed the appeal on June 1, 1953, also ruling that plaintiff's case did not merit suspension of deportation. Plaintiff was taken into custody by the Immigration and Naturalization Service for deportation on June 2, 1953. On the same date he filed a petition for writ of habeas corpus in the United States District Court, New Orleans, Louisiana. The petition was dismissed on June 8, 1953 (113 F. Supp. 21), the Court finding that the deportation order was valid. The Court of Appeals for the Fifth Circuit affirmed the District Court on May 6, 1954 (212 F. 2d 830). The Court of Appeals and the order of deportation were upheld by the Supreme Court on May 31, 1955 (349 U.S. 302, *rehearing denied* 350 U.S. 856.)

6. Admitted.

7. Defendant admits that there is no place to which plaintiff may be deported at the present time but denies the remaining part of allegation 7 which states that there is no place to which plaintiff may be deported in the immediate future.

8. Defendant admits that plaintiff has lived in the United States for over 40 years but avers that as to the remaining portions of allegation 8 he is without sufficient knowledge or information to form a belief as to the truth of the allegation regarding plaintiff's family ties.

9. Denied. Defendant further avers that upon being arrested by the Immigration and Naturalization Service on December 30, 1952, plaintiff was released on $5,000 administrative bond. This bond was cancelled on March 10, 1953

and a new $5,000 bond issue containing provision "that said alien shall not travel outside the State of Louisiana." After decision of the Board of Immigration Appeals on June 1, 1953, plaintiff was taken into custody on June 2, 1953 for deportation. After denial of petition for writ of habeas corpus by the United States District Court in New Orleans on June 8, 1953, and filing of the notice of appeal on the same date, plaintiff was released on $10,000 court bond. After the order of deportation was ultimately upheld by the Court of Appeals and the Supreme Court, and the judgment of the Sapreme Court was made the judgment of the U.S. District Court of New Orleans, on August 8, 1955, plaintiff was directed to surrender to the Immigration and Naturalization Service at New Orleans, for deportation on August 11, 1955, later extended to August 17, 1955. He surrendered as directed and the court bond was cancelled.

On August 8, 1953 when plaintiff was ordered to report for deportation, the Immigration and Naturalization Service was in possession of an Italian travel document for plaintiff, valid to September 10, 1955. On August 11, 1955 this travel document was recalled by the Italian Consul in New Orleans and revoked.

On or about August 26, 1955, plaintiff filed a petition for writ of habeas corpus in the U.S. District Court, New Orleans, charging that the Immigration and Naturalization Service was not able to deport him and he was being illegally detained. The District Court dismissed the writ on August 30, 1955, holding that his detention without bail was not arbitrary and further denied motion for bail pending appeal. Plaintiff filed notice of appeal with the Court of Appeals, Fifth Circuit, for denial of writ and also for denial of bail pending appeal. On September 9, 1955, the Court of Appeals denied the motion for bail pending appeal. On application to the Supreme Court for release on bail pending appeal in the Court of Appeals, Fifth Circuit, Mr. Justice Hugo L. Black on September 16, 1955, ordered that petitioner "be released from custody and admitted to bail until his deportation can be effectuated, PROVIDED, however, that the petitioner shall execute and file with the Clerk of the District Court for the

Eastern District of Louisiana a good and sufficient surety in the sum of $10,000.00 conditioned that he will appear for deportation upon three days notice when arrangements for his deportation have been completed, and the Immigration and Naturalization Service notifies him to appear." In accordance with this order, petitioner was released on September 16th upon posting bond containing conditions as above with the Clerk of the U.S. District Court at New Orleans.

By stipulation dated October 10, 1955, petitioner's counsel, Jack Wasserman, and Solicitor General Simon E. Sobeloff, agreed that "petitioner will be released upon administrative bail in the amount of $10,000, conditioned for his delivery into custody for deportation upon three days' notice, that such bond will be substituted for the judicial bond previously executed herein and that, in view of the foregoing counsel herein consent to the vacating of the Order of Mr. Justice Black dated September 16, 1955." This stipulation was entered into after negotiations between plaintiff's counsel, Jack Wasserman, and representatives of the defendant. During said negotiations, Mr. Wasserman proposed that the stipulation include the same conditions as set forth in Mr. Justice Black's Order of September 16, 1955, but the defendant's representatives objected thereto and the conditions of the stipulation dated October 10, 1955, were finally signed and filed.

On October 11, 1955 Justice Black, in view of the above stipulation, vacated his order of September 16, 1955. As part of the understanding for executing the stipulation of October 10, a further stipulation was signed by attorneys for plaintiff and the U.S. Attorney, New Orleans, on October 10, 1955, setting forth that in view of the fact that the Immigration and Naturalization Service was agreeing to release petitioner on administrative bail that appeal in the Court of Appeals, Fifth Circuit, be dismissed on the ground of mootness. A bond containing the conditions set forth in the stipulation of October 10, 1955, was executed by plaintiff on October 19, 1955.

On or about June 28, 1955 complaint for declaratory judgment (amended August 10, 1955), Civil Action No. 2763-55, was filed by plaintiff in the United States District

Court for the District of Columbia, again seeking to review plaintiff's order of deportation and to restrain the Government from deporting him. On October 25, 1955 the District Court granted the Government's motion for summary judgment.

The plaintiff was directed to appear at the office of the Immigration and Naturalization Service, New Orleans, on April 26, 1956, his administrative bond was cancelled and pursuant to 8 U.S.C. 1252(d) he was placed under order of supervision (which plaintiff refused to sign) by Acting District Director Sam Bernsen, New Orleans. Paragraph 6 of the order of supervision provided that plaintiff shall not leave the parishes of Orleans, Jefferson, or St. Bernard, without first obtaining written or oral permission from a representative of the Acting District Director, New Orleans, Louisiana. On May 28, 1956 an amended order of supervision was executed by Acting District Director Bersen (which plaintiff refused to sign) in confirmation of letter of May 3, 1956 from said Acting District Director to plaintiff's attorney, Jack Wasserman. Paragraph 6 of the order of supervision was amended to conform to the proposal in the letter of May 3 as follows: "That said alien shall not leave the parishes of Orleans, Jefferson and St. Bernard, Louisiana, without furnishing notice, prior to departure, to the Acting District Director, New Orleans, Louisiana, in writing or by telephone, of intention to go beyond the confines of said parishes, and the details of his itinerary (including places and periods of intended stay) during each absence from said parishes; and that, if during any such absence from said parishes, the said alien changes his itinerary (including places and periods of stay) from that furnished in the notice of intended absences, he shall immediately notify the Acting District Director, New Orleans, Louisiana, in writing or by telephone of each and every such change".

This action was filed May 16, 1956.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of allegation 10 and demands strict proof thereof, if material.

11. Defendant admits that on October 10, 1955 in the Supreme Court in the case of *U.S. ex rel. Carlos Marcello*

v. *Nabors*, defendant through the Solicitor General stipulated with plaintiff's attorney that plaintiff be released on $10,000 bail but denies that the release on bail was "pending deportation" and that *plaintiff* "would be given three days' advance notice of any contemplated deportation". The defendant avers that the stipulation provided merely that plaintiff's $10,000 *bail* be "conditioned for his delivery into custody for deportation upon three days' notice . . . ".

12. Defendant admits allegation 12, although immaterial to this litigation. The defendant further avers that the issue raised by the appeal to the Court of Appeals for the Fifth Circuit, to wit, plaintiff's detention under 8 U.S.C. 1252(c), would have been moot six months from the date of the order of deportation, or if judicial review is had, then from the date of the final order of the Court. In this case six months from the amended warrant of deportation, dated October 20, 1955, was April 21, 1956, but inasmuch as a declaratory judgment action had been filed in the U.S. District Court for the District of Columbia and a decision rendered by that Court on October 25, 1955, dismissing the action, six months from that date was April 26, 1956. On this six-month date, April 26, 1956, plaintiff's status changed by statute and he was processed pursuant to 8 U.S.C. 1252(d). Because no bond is authorized under this section, plaintiff's administrative bond was cancelled and he was put under the order of supervision described in defendant's allegation 9.

13. Admittted.

14. Defendant denies that his agents repudiated the aforesaid stipulation and denies that the plaintiff is restricted to the parishes of Orleans, Jefferson, and St. Bernard in the City of New Orleans. Defendant admits that plaintiff will not be given any advance notice of deportation. Defendant further sets forth as an averment to this allegation, those allegations set forth in defendant's answer to allegation 9.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff is hampered in his music box and real estate business and visiting his sister but specifically denies that he

must obtain special permission for traveling as set forth in defendant's answer to allegation 9.

16. Defendant admits that no "hearing" was held concerning the order of supervision, except to aver that modification was made of the original order of supervision upon representations made by plaintiff's counsel as set forth in defendant's allegation 9. Defendant denies the remaining part of plaintiff's allegation 16. Defendant further avers that notice of the proposed execution of the order of supervision on April 26, 1956, was given plaintiff and his counsel.

17. Defendant denies the first sentence of allegation 17 of the complaint averring that no "parole conditions" existed from the time the stipulation was entered into and until April 26, 1956. The defendant further avers that plaintiff's position under 8 U.S.C. 1252 was altered on April 26, 1956 to require supervision of plaintiff pending deportation under regulations prescribed by the Attorney General (See 8 C.F.R. 242.2(d)). Defendant is without knowledge or information sufficient to form a belief as to the truth of the second sentence of allegation 17 and demands strict proof thereof, if material.

18. and 19. Denied.

Second Defense

For further answer and as a separate and complete defense to the complaint the defendant avers that the complaint fails to set forth a claim upon which this Court can grant relief.

Third Defense

For further answer and as a separate and complete defense to the complaint the defendant avers that this Court is without jurisdiction of the subject matter of the complaint.

Fourth Defense

For further answer and as a separate and complete defense to the complaint the defendant avers that the provisions of the order of supervision referred to herein are reasonable and proper under statutes and regulations pre-

scribed thereunder by the Attorney General and that there has been no arbitrary or capricious determination.

WHEREFORE, having fully answered the plaintiff's complaint the defendant demands judgment together with the costs of this action.

OLIVER GASCH,
United States Attorney.

MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

(Filed October 30, 1956)

Comes now the plaintiff herein and upon all the pleadings and proceedings heretofore had herein, moves the Court for a temporary restraining order and a preliminary injunction restraining the defendant and his agents from apprehending or deporting the plaintiff unless three days notice of such proposed action is first given to the plaintiff herein.

JACK WASSERMAN,
Attorney for Plaintiff.

MOTION FOR SUMMARY JUDGMENT

(Filed October 15, 1956)

Comes now the plaintiff and upon the annexed affidavit and all the pleadings and proceedings herein, moves for summary judgment upon the ground that there is no triable issue of fact herein and that as a matter of law the plaintiff is entitled to judgment.

JACK WASSERMAN,
Attorney for Plaintiff.
902 Warner Building,
Washington 4, D. C.

AFFIDAVIT

(Filed October 15, 1956)

STATE OF LOUISIANA,
Parish of Jefferson, ss:

CARLOS MARCELLO, being duly sworn, deposes and says:

1. I am the plaintiff herein.
2. I first came to the United States on October 7, 1910,

when I was eight months of age. I have been a resident ever since.

3. I am married to an American citizen, and I am the father of four American born children. My entire family resides in the United States and I have no close relatives abroad.

4. On December 30, 1952, I was arrested in deportation proceedings and released on $5,000 administrative bond, as defendant admits in paragraph 9 of his answer. This bond did not limit my right to travel in the United States. On June 1, 1953, a final order of deportation was entered against me. Thereafter on June 8, 1953, I was permitted to be at large on a judicial bond of $10,000 which did not limit my right to travel throughout the United States. This bond remained in force until August 17, 1955, when I was taken into custody for deportation Italy. As of this date the Italian Government has refused to accept me for deportation.

5. On September 16, 1955, Mr. Justice Hugo Black directed that I be released upon bail of $10,000 and given three days notice of deportation. A copy of his order is attached hereto and marked Exhibit "A". This order permitted me to travel throughout the State of Louisiana and the United States without restrictions.

6. On October 10, 1955, the Solicitor General and my counsel executed the attached stipulation marked Exhibit "B" which authorized my release upon $10,000 administrative bail and directed that I be given three days notice of deportation. This stipulation has never been superseded or revoked by the parties herein. Under this stipulation I was permitted and did travel throughout the State of Louisiana and the United States without restriction. Upon the basis of this stipulation and the consent of the parties herein, Mr. Justice Black entered an order on October 11, 1955, revoking his order of September 16, 1955.

7. On April 26, 1956, the defendant through his agents served me with an order which as subsequently amended on May 28, 1956, directed that I shall not leave the Parishes of Orleans, Jefferson, or St. Bernard "without furnishing notice prior to departure to the Acting District Director, New Orleans, Louisiana, in writing or by telephone, of in-

tention to go beyond the confines of said parishes and the details of his itinerary * * *." By letter, dated May 3, 1956, the Acting District Director advised my attorney that the Immigration Service no longer considered itself bound to give me three days notice of deportation.

8. The Parishes of Orleans, Jefferson, and St. Bernard are what is commonly known as Metropolitan New Orleans, and under the terms of the order of April 26, 1956, I can not leave New Orleans without prior consent of the Immigration Service. This means that on Sunday I cannot visit my sister and her husband who are outside the named parishes —a few miles from my residence—unless I can reach an immigration officer by phone who is authorized to grant the requested permission.

9. More important is the fact that I am presently engaged in the music box, motel, and real estate business. My business activities require my presence outside of Metropolitan New Orleans to inspect real estate and visit business prospects. Each time a business appointment is made outside of New Orleans—I must first locate an immigration official and secure his consent. In the real estate business, where such appointments are made in the evenings and over weekends, such restrictions upon my activities are unnecessarily restrictive.

10. The fact is that from 1953 to April 26, 1956—more than two years—there were no such restrictions upon my activities. During this period, I was permitted to travel throughout the length and breadth of Louisiana and the United States. No circumstances have occurred since 1953 warranting a change in the conditions of my parole. The limitations upon my travel are not only onerous and arbitrary, but violate the stipulation between my counsel and the Solicitor General (Exhibit "B").

11. As alleged in my complaint, from December 30, 1952, to April 26, 1956 (and to date), I have not engaged in any subversive or criminal activities, and I have always abided by the conditions of parole or bail imposed upon me by the defendant or the Courts. This fact is confirmed in part by the sworn testimony of Horace Nabers of the Immigration Service in *U.S. ex rel. Marcello* v. *Nabers*, No. 15777, Court

of Appeals, Sixth Circuit. Mr. Nabers testified on August 30, 1955 (Transcript, pp. 26):

"Q. Now is there any contention on the part of your office that Mr. Marcello is presently engaged in subversive activities or was, prior to his incarceration on August 17th?

A. We have no evidence to that effect.

Q. Do you have any evidence that he was engaged in criminal activities prior to his arrest or surrender on August 17th?

A. No we don't, because we didn't investigate him, so we have no evidence.

Q. Has Mr. Marcello always appeared when requested by the Immigration Service?

A. He has.

Q. Has he ever defaulted or breached on any immigration bond?

A. Not to my knowledge."

12. The sole basis advanced by the defendant for a change in my travel rights, for the imposition of arbitrary conditions restricting me to New Orleans, and for disregarding the stipulation with the Solicitor General is that six months have elapsed. In a letter to my attorney, dated May 3, 1956, the Acting District Director stated:

"As you know, on October 19, 1955, there was pending in Marcello's case an action seeking judicial review of the order for his deportation on its merits. It is our understanding that the three day notice provision placed in the administrative bail bond pursuant to your stipulation with the Solicitor General ran only for the period during which judicial proceedings were pending in Marcello's case and for the six month period thereafter during which the Attorney General had authority under Section 242(c) of the Immigration and Nationality Act to detain Marcello or require him to post a substantial bond to ensure his appearance when required by the Service for deportation.

"Of course, the situation changed when the time during which the Service could require Marcello to post

substantial bond or remain in Service custody pending deportation expired on April 26, 1956. As we read the *Carlson, Yanish,* and *Carisle* opinions of the Supreme Court, the Service has authority (and I may add a corresponding duty) under Section 242(d) of the Immigration and Nationality Act to impose such reasonable restrictions as would, in our judgment, aid us in carrying out our responsibility to effectuate Marcello's deportation pursuant to law as soon as that can be done."

13. As appears from the foregoing, the defendant has repudiated Exhibit B. He reads into that stipulation a six month limitation which is not there. The whole purpose of the litigation in New Orleans which gave rise to the stipulation (Exhibit B) was to obtain my release. There was no express or implied limitation that such stipulation would expire in six months or at the termination of the litigation. On the contrary, the litigation in New Orleans was dismissed as moot because of my release pursuant to Exhibit B.

14. Defendant takes the peculiar position of saying that when it had the power to detain me or release me upon bail (for six months after the final order of deportation), it was not necessary to restrict me to New Orleans. Now when they have less power over me (only power to parole and no power to detain), it is necessary to restrict my liberty—even though no other circumstances have intervened. This overlooks two facts. *First*, the existence of the power does not require its exercise. *Secondly*, parole conditions should not be made more restrictive solely because of the lapse of time. This is no justification for added restrictions.

15. Because of the violation of the stipulation executed by the Solicitor General and the arbitrary nature of the conditions imposed upon me, I respectfully ask for judgment declaring the order of the defendant of April 26, 1956, null and void.

(Sgd.) CARLOS MARCELLO.

Sworn to and subscribed before me this 10 day of October, 1956.

(S.) DEAN A. ANDREWS, JR.,
Notary Public.

Plaintiff's Exhibit "A"

UNITED STATES SUPREME COURT

OCTOBER TERM, 1955

UNITED STATES OF AMERICA EX REL. CARLOS MARCELLO, PETITIONER

v.

HORACE NABERS, OFFICER IN CHARGE IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

ORDER

Upon consideration of the application of the petitioner, Carlos Marcello, for his release from custody on bail pending a determination of the petitioner's appeal in the United States Court of Appeals for the Fifth Circuit and the opposition of the Government herein, it is

Ordered that the petitioner, Carlos Marcello, be released from custody and admitted to bail until his deportation can be effectuated, provided, however, that the petitioner shall execute and file with the Clerk of the District Court for the Eastern District of Louisiana a good and sufficient surety in the sum of $10,000.00, conditioned that he will appear for deportation upon three days notice when arrangements for his reportation have been completed, and the Immigration and Naturalization Service notifies him to appear.

Dated: September 16, 1955.

(Sgd.) HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Plaintiff's Exhibit "B"

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

UNITED STATES OF AMERICA EX REL. CARLOS MARCELLO, PETITIONER

v.

HORACE NABERS, OFFICER IN CHARGE IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

STIPULATION

It is hereby stipulated by and between counsel for the respective parties herein, that the petitioner will be released upon administrative bail in the amount of $10,000, conditioned for his delivery into custody for deportation upon three days' notice, that such bond will be substituted for the judicial bond previously executed herein and that, in view of the foregoing, counsel herein consent to the vacating of the Order of Mr. Justice Black dated September 16, 1955.

(Sgd.) JACK WASSERMAN,
Counsel for Petitioner.

(Sgd.) SIMON E. SOBELOFF,
Solicitor General,
Counsel for Respondent.

Dated: October 10, 1955.

OPPOSITION TO PLAINTIFF'S MOTIONS FOR PRELIMINARY INJUNCTION AND FOR SUMMARY JUDGMENT, AND CROSS-MOTION OF DEFENDANT FOR SUMMARY JUDGMENT

(Filed November 30, 1956)

Comes now the defendant, Herbert Brownell, Jr., Attorney General of the United States, by his attorney, the United States Attorney, and opposes Plaintiff's Motions for Preliminary Injunction and for Summary Judgment, and further, moves this Honorable Court for summary judgment for defendant. On the basis of the pleadings and the following exhibits, which are attached hereto and made a part of this motion, there is no genuine issue as to any material

fact and defendant is entitled to judgment as a matter of law.

Exhibit No. 1—Administrative bond of March 10, 1953
Exhibit No. 2—Administrative bond of October 19, 1955
Exhibit No. 3—Order of Supervision of April 26, 1956
Exhibit No. 4—Order of Supervision of May 28, 1956
Exhibit No. 5—Letter of Acting District Director Bernsen of May 3, 1956.
Exhibit No. 6—Affidavit of L. Paul Winings in Civil Action 4277-56
Exhibit No. 7—Letter of Consul General of Italy of November 9, 1956
Exhibit No. 8—Motion of Plaintiff for Stay of Deportation.

OLIVER GASCH,
United States Attorney.

DEFT'S EXHIBIT 2

The rate of premium on this bond is $20.00 per Thousand. Total premium charged $200.00.

BOND CONDITIONED FOR THE DELIVERY OF AN ALIEN

(Note.—Instructions on Form I-308 should be strictly followed in preparing this bond)

CARLOS MARCELLO aka CALOGERO MINACARI

October 19, 1955

Approved and accepted:

SAM BERNSEN,
Officer in Charge.

Know all men by these presents:

That we, Carolina Casualty Insurance Company, residing at Burlington, North Carolina, are held and firmly bound unto the United States of America, in the full and just sum of Ten Thousand and no 100 dollars ($10,000.00), as liquidated damages and not as a penalty, to be paid to the United States, for which payment well and truly to be made, without relief from valuation or appraisement laws, we, and each of us, do bind ourselves, our heirs, execu-

tors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of October, 1955.

Whereas, Carlos Marcello aka Calogero Minacari, an alien, aged 44 years, a native of Africa, who arrived at the port of Laredo, Texas per unknown method during 1936 or 1937, has been placed under arrest under the provisions of the immigration laws of the United States on warrant of the Attorney General, issued on the 24th day of December, 1952, on the charge that he is unlawfully within the United States;

And whereas, the said alien has applied for release from custody upon giving a bond in accordance with section 242 of the Immigration and Nationality Act;

Now, Therefore, in the event the said alien is released from custody either pending final determination of the alien's deportability or after a final order of deportation has been made, the conditions of this obligation are that (1) if the above-bounden obligors, or either of them, shall cause the said alien to be produced or to produce himself to an officer of the United States Immigration and Naturalization Service, hereinafter called an "Immigration Officer," upon three days notice and pursuant to his request or that of any other immigration officer, for the purpose of defending himself or herself against the charge or charges under which the said alien has been taken into custody and any other charges which subsequently are lodged against the alien or for detention or for such other reason provided for by regulation as the immigration officer making the request shall give for requiring such delivery, and further, notwithstanding any delivery of the said alien as aforesaid, (2) if the above-bounden obligors, or either of them, shall cause the said alien to be delivered into the actual physical custody of an immigration officer, upon three days notice and pursuant to his request or that of any other immigration officer, for deportation if an order of deportation has been made against said alien, and said alien is accepted by such immigration officer, then this obligation shall be void; otherwise it shall remain in full force and virtue;

Provided, that it is hereby specifically covenanted and agreed by the above-bounden obligors, and each of them, that no order issued by or under the authority of the Attorney General by virtue of which the said alien is or may be granted additional time to appear to defend himself or herself or for such other purpose as delivery of the alien may be requested, or by virtue of which issuance or execution of an order of deportation is or may be deferred, or by virtue of which the said alien is or may be permitted to depart voluntarily from the United States, shall be in any manner construed to impair or render void this obligation or any part thereof.

On line 3, the word "and"; on line 4, the words "residing at"; on line 13, the words "on the", "day of" and the figure "19", all deleted before execution of this bond.

On lines 23 and 29, the words "three days notice" inserted after the word "upon", prior to execution of the bond.

Signed and sealed in the presence of—

CAROLINA CASUALTY INSURANCE COMPANY

By: —— ——,

Resident Agent-Attorney in Fact.

DEFENDANT'S EXHIBIT 5

908 Masonic Temple, 333 St. Charles Avenue
New Orleans 12, Louisiana
May 3, 1956

Jack Wasserman, Esquire
Counselor at Law
Warner Building
Washington 4, D. C.

Re: CARLOS MARCELLO

Dear Mr. Wasserman:

This is in response to your letter of April 30, 1956, objecting to part of the Service's "Order of Supervision" (on Form I-220-B) placed in effect in the case of Carlos Marcello, also known as Calogero Minacari, on April 26, 1956.

As you know, April 26, 1956 marked the expiration of the six-month period following final disposition of the judicial proceedings brought to review the final order issued for Marcello's deportation. The expiration of this period ended the discretionary authority of the Service, under Section 242(c) of the Immigration and Nationality Act, to detain Marcello or release him on an administrative bail bond pending his deportation. As you also know, it was not possible for the Government to secure a document to effect Marcello's deportation prior to the expiration of such six-month period. The "Order of Supervision" was then placed in effect in Marcello's case, to carry out what we conceive to be our responsibilities under Section 242(d) of the Immigration and Nationality Act.

Careful consideration has been given to your assertion that the condition in the "Order of Supervision" which provides that Marcello may not leave the parishes of Orleans, Jefferson and St. Bernard without first obtaining the written or oral consent of this office, is onerous. While we feel that this condition is not unduly burdensome, we propose to amend the condition objected to so as to provide as follows:

> (6) That said alien shall not leave the parishes of Orleans, Jefferson and St. Bernard, Louisiana without furnishing notice, prior to dep.. rture, to the Acting District Director, New Orleans, Louisiana, in writing or by telephone, of intention to go beyond the confines of said parishes, and the details of his itinerary (including places and periods of intended stay) during such absence from said parishes; and that, if during any such absence from said parishes, the said alien changes his itinerary (including places and periods of stay) from that furnished in the notice of intended absence, he shall immediately notify the Acting District Director, New Orleans, Louisiana in writing or by telephone of each and every such change.

The above changed requirement eliminates the necessity for Marcello obtaining prior Service consent to his traveling and is, in our view, a reasonable requirement to ensure Marcello's availability for execution of the order for his

deportation as soon as practicable after a document therefor becomes available.

We have also given serious consideration to your objection to the omission from the "Order of Supervision" of a three-day notice provision corresponding to the provision which had formerly been contained in the administrative bail bond posted in Marcello's behalf on October 19, 1955. As you know, on October 19, 1955 there was pending in Marcello's case an action seeking judicial review of the order for his deportation on its merits. It is our understanding that the three-day notice provision placed in the administrative bail bond pursuant to your stipulation with the Solicitor General ran only for the period during which judicial proceedings were pending in Marcello's case and for the six-month period thereafter during which the Attorney General had authority under Section 242(c) of the Immigration and Nationality Act to detain Marcello or require him to post a substantial bond to ensure his appearance when required by the Service for deportation.

Of course, the situation changed when the time during which the Service could require Marcella to post substantial bond or remain in Service custody pending deportation expired on April 26, 1956. As we read the *Carlson*, *Yanish*, and *Carlisle* opinions of the Supreme Court, the Service has authority (and, I may add, a corresponding duty) under Section 242(d) of the Immigration and Nationality Act to impose such reasonable written restrictions on Marcello's activities and conduct as would, in our judgment, aid us in carrying out our responsibility to effectuate Marcello's deportation pursuant to law as soon as that can be done.

It is therefore necessary to deny your request for the inclusion of a three-day notice provision in the "Order of Supervision" placed in effect in Marcello's case.

Yours very truly,

SAM BERNSEN,
Acting District Director.

CC (2): Gilbert Zimmerman, Regional Counsel, Richmond, Va.
SB:fl.

Order

(December 7, 1956)

Upon consideration of motion of plaintiff for summary judgment and the opposition of defendant thereto, and after argument of counsel, it is by the Court this 7 day of December 1956

Ordered that the motion of plaintiff for summary judgment be and the same hereby is denied.

Burnita Shelton Matthews,
Judge.

Order

(Filed January 2, 1957)

This cause having come on for hearing on plaintiff's motion for summary judgment, and defendant's opposition thereto, and defendant having cross-moved for summary judgment, and plaintiff having been accorded an opportunity to oppose, and this Court having, on December 7, 1956, entered an order denying plaintiff's motion for summary judgment, and it appearing to the Court from the pleadings and certified documents herein and from the argument of counsel, that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law, it is this 2nd day of January, 1957,

Ordered that defendant's cross-motion for summary judgment be and hereby is granted and the complaint herein be and the same is hereby dismissed.

Burnita Shelton Matthews,
Judge.

Notice of Appeal

(Filed January 7, 1957)

The plaintiff hereby appeals from the order herein of the District Court, dated January 2, 1957, granting summary judgment to the defendant, and from the Court's order de-

nying plaintiff's motion for summary judgment, dated December 7, 1956.

JACK WASSERMAN,
Attorney for Plaintiff.

Copy to Oliver Gasch, Esquire, United States Attorney, United States Court House, Washington 1, D. C.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2046-56

CARLOS MARCELLO, PLAINTIFF

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

ORDER DIRECTING TRANSMITTAL OF ORIGINAL FILE

(Filed January 7, 1957)

Upon consent of the parties herein, it is this 7 day of January, 1957,

Ordered that the file herein be transmitted to the Court of Appeals in its original form.

MATTHEW MCGUIRE,
United States District Judge.

A-2,669,541

908 MASONIC TEMPLE BUILDING
New Orleans, Louisiana

February 4, 1957

Mr. Carlos Marcello
800 Barataria Boulevard
Marrero, Louisiana

Dear Mr. Marcello:

There is enclosed Amended Order of Supervision (Form I-220B) dated February 4, 1957. Your attention is directed to paragraph 6 of said order, which reads as follows:

"That said alien shall not leave the parishes of Orleans, Jefferson and St. Bernard, unless he first submits to the Acting District Director, Immigration and Naturalization Service, New Orleans, Louisiana, during regular business hours, a written request to leave said parishes, setting forth in detail the reason or reasons for the request, and giving all the facts of his proposed itinerary (including each full address and period of stay, and the names and addresses of all persons to be visited), and receives prior to departure written permission from said Acting District Director specifying the places which may be visited together with times and conditions."

Please sign your full name on the reverse side of the duplicate copy at the place indicated by the red X mark, and return the said copy to this office in the attached self-addressed envelope, which requires no postage.

Very truly yours,

SAM BERNSEN,
Acting District Director.

Encl. Special Delivery. Registered Mail. Return Receipt Requested.

cc: Mr. Dean A. Andrews, 631 Maison Blanche Bldg., New Orleans, La.

Mr. Jack Wasserman, Warner Building, Washington, D. C. (Air mail) (Registered).

Mr. G. Wray Gill, 1707 Pere Marquette Building, New Orleans, La.

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

908 Masonic Temple Building, New Orleans, La.

District File No. A-2,669,541

A. R. No. A-2,669,541

Date February 4, 1957

AMENDED ORDER OF SUPERVISION

In the case of Carlos Marcello or Calogero Minacari, whose deportation in accordance with law was ordered on October 20, 1955.

Section 242(d) of the Immigration and Nationality Act provides:

> "Any alien, against whom a final order of deportation was defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall

upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than 1 year, or both."

Therefore, it is hereby ordered that such alien shall be placed under supervision and permitted to be and to remain at large upon the following terms:

(1) That said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitting to medical and psychiatric examination and or to furnish such information as may be deemed fit and proper.

(3-a) That said alien shall not change (his) place of residence from 800 Barataria Boulevard, Marrero, Louisiana (Immigration district, State or city) without first securing written permission of the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) at least 48 hours prior to such contemplated change.

(3-b) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) of any change in residence or employment within 48 hours after change is made.

(4) That said alien shall report in (Person) on the first business day of each —— (Week) month (Month) at 9:00 (a.m.) to the Officer in Charge of the Immigration and Naturalization Service at Room 918 Masonic Temple Bldg., 333 St. Charles St., New Orleans, La. The written report shall contain (a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment, (f)

(5) That said alien shall conduct himself in a peaceable, law-abiding manner.

(6) See continuation sheet attached for terms numbers 6, 7 and 8.

SAM BERNSEN,
Acting District Director.

New Orleans, Louisiana (Place)

6. That said alien shall not leave the Parishes of Orleans, Jefferson and St. Bernard, unless he first submits to the Acting District Director, Immigration and Naturalization Service, New Orleans, Louisiana, during regular business hours, a written request to leave said Parishes, setting forth in detail the reason or reasons for the request, and giving all the facts of his proposed itinerary (including each full address and period of stay, and the names and addresses of all persons to be visited), and receives prior to departure written permission from said Acting District Director specifying the places which may be visited together with times and conditions.

7. That said alien shall not associate or consort with known criminals, or persons believed by him to be criminals, or persons engaged in criminal activities.

8. That said alien shall not frequent places or establishments where he knows, or has reason to believe, criminals or persons with a criminal record, congregate.